STATE OF MICHIGAN

IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
JUDGES: E. THOMAS FITZGERALD, MARK J. CAVANAUGH AND ALTON T. DAVIS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v Supreme Court No. 141154

SELESA A. LIKINE,

Defendant-Appellant.

_____/

BRIEF FOR MICHIGAN CRIMINAL LAW PROFESSORS AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

By: Eve Brensike Primus (P70420)
Assistant Professor of Law
The University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109
(734) 615-6889
Attorney for Amicus Curiae

TABLE OF CONTENTS

INDEX OF AUTHORITIES

FEDERAL CASES

MICHIGAN CASES

OTHER CASES

OTHER AUTHORITIES

STATEMENT OF QUESTIONS INVOLVED

I. **By refusing to allow Ms. Likine to present a defense of inability to pay her assessed child support, did the courts below violate her rights under the Michigan Constitution as interpreted by this Court in *City of Port Huron v Jenkinson*, 77 Mich. 414, 43 N.W. 923 (1889)?**

The Trial Court answered: "No."

The Court of Appeals answered: "No."

Defendant-Appellant answers: "Yes."

Plaintiff-Appellee answers: "No."

Amicus Curiae Michigan Criminal Law Professors answers: "Yes."

II. **By refusing to allow Ms. Likine to present a defense of inability to pay her assessed child support, did the courts below violate her rights under the Fourteenth Amendment?**

The Trial Court answered: "No."

The Court of Appeals answered: "No."

Defendant-Appellant answers: "Yes."

Plaintiff-Appellee answers: "No."

Amicus Curiae Michigan Criminal Law Professors answers: "Yes."

INTEREST OF AMICUS CURIAE

Amici curiae criminal law professors are eighteen law professors who teach, research, and write about criminal law in the state of Michigan. The names, titles, and institutional affiliations (for identification purposes only) of these *amici* are listed in the Appendix. Some *amici* work as clinical professors, in which capacity they regularly counsel and advise clients in criminal matters and train attorneys on how to effectively represent such clients. *Amici* have a professional interest in this Court's consideration of the doctrinal, constitutional, and policy issues involved in this case, particularly in this Court's interpretation of the contours of the involuntary act doctrine and its applicability to criminal charges.

SUMMARY OF ARGUMENT

The Michigan Court of Appeals decision improperly conflates the criminal law concepts of *actus reus* and *mens rea*. If affirmed, it would make Michigan the first state in the nation to reject the fundamental tenet that a person is only criminally responsible for voluntary acts, and it would undermine the purposes of the criminal law by penalizing people for failing to do the impossible. It would also require this Court to overrule a longstanding and important precedent that, according to this Court's own principles of *stare decisis*, should be retained. *See City of Port Huron v. Jenkinson*, 77 Mich. 414, 419, 43 N.W. 923, 924 (1889). Finally, it would unfairly punish individuals for failing to perform acts that it is impossible for them to perform in violation of the Michigan and United States' Constitutions.

The Court of Appeals's finding that collateral estoppel principles apply to bar defendants from raising their inability to pay in felony nonsupport prosecutions rests on a faulty premise – namely, that a defendant's ability to pay is not an essential element of the criminal charge of

felony failure to pay to child support. The *actus reus* is an essential element of any criminal charge. Therefore, it would unconstitutionally infringe on Ms. Likine's constitutional rights to trial by jury and to the presumption of innocence in violation of this Court's decision in *People v. Goss*, 446 Mich. 586, 600, 521 N.W. 2d 312, 316-17 (1994), were she precluded from contesting that she did not commit the relevant *actus reus* of failing to pay child support because her actions were involuntary.

ARGUMENT

I. THE VOLUNTARY ACT REQUIREMENT IS A FUNDAMENTAL TENET OF CRIMINAL LAW.

"One basic premise of Anglo-American criminal law is that no crime can be committed by bad thoughts alone. Something in the way of an act ... is required too." Wayne R. LaFave, *Substantive Criminal Law* § 6.1(b), pg. 423 (2d ed. 2008). It is similarly axiomatic that a person is not criminally responsible for an involuntary act. Every state in the country requires that criminal liability be predicated on a voluntary act. *See id.* § 6.1(c), pg. 425 n.24 (explaining that most states expressly codify the voluntary act requirement); *see also* Jack Apol & Stacey Studnicki, *Criminal Law*, 51 Wayne L. Rev. 653, 674 (2005) ("An involuntary act – or an involuntary failure to act when there was a duty to do so – has never before been subject to punishment in American law."). In fact, English-speaking courts across the globe recognize that a voluntary act is a prerequisite for criminal liability.[1] The drafters of the Model Penal Code,

[1] *See, e.g., Kilbride v. Lake* [1962] N.Z.L.R. 590, 593 ("[I]t is a cardinal principle that, altogether apart from the mental element of intention or knowledge of the circumstances, a person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him. If this condition is absent, any act or omission must be involuntary, or unconscious, or unrelated to the forbidden event in any causal sense regarded by the law as involving responsibility."); *see also Hill v. Baxter* [1958], 1 QB 277 (holding that, in England, a person cannot be criminally liable for involuntary acts); *O'Sullivan v. Fisher*, 1954 S.R. (S.A.) 33 (same in Australia); *R. v. de Jager*, 1917 C.P.D. 558

recognizing the overwhelming support for a voluntary act requirement, incorporated the requirement into their proposed code. *See* Model Penal Code § 2.01(1) ("A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act…."). As one prominent treatise writer put it, "[a] voluntary act is an absolute requirement for criminal liability." Wayne R. LaFave, *Substantive Criminal Law* § 6.1(c), pg. 429 (2d ed. 2008).

Just what makes an act involuntary? Consider the following examples: A person strikes another person as part of an uncontrollable muscle spasm; a person falls into another person as a result of being attacked by a swarm of bees; a person temporarily loses control of his vehicle because he is unexpectedly hit in the face with a stone. In all of these situations, the actor's movements "are not subordinated to [his] conscious plans of action: they do not occur as part of anything [he] takes himself to be doing." H.L.A. Hart, *Acts of Will and Responsibility*, in Punishment and Responsibility 105 (1968). These acts are not done under circumstances where there was some other potential course of action available to the actor. Rather, they are "explainable by factors which casually prevent the exercise of normal capacities of control or eliminate such capacities entirely." Jeffrie G. Murphy, *Involuntary Acts and Criminal Liability*, 81 Ethics 332, 340 (1971). When this occurs, the purposes of criminal punishment would not be served by holding the actor criminally responsible.

The deterrent function of the criminal law would not be served by punishing these actions, because they are not the product of conscious choice and therefore cannot be deterred. *See* Wayne R. LaFave, *Substantive Criminal Law* § 6.1(c), pg. 425-26 (2d ed. 2008) ("The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred."); *see also* Model Penal Code commentary to § 2.01(1)

(same in South Africa); J. Edwards, *Automatism and Criminal Responsibility*, 21 Mod. L. Rev. 375, 379-80 n.22 (1958) (collecting cases from England, Ireland, and Australia).

at 214-15 ("[T]he law cannot hope to deter involuntary movement or to stimulate action that cannot physically be performed."). Similarly, with respect to retributivist principles of punishment, "there would appear to be no reason to impose punishment on this basis as to those whose actions were not voluntary." Wayne R. LaFave, *Substantive Criminal Law* § 6.1(c), pg. 426 (2d ed. 2008). Finally, it does not make sense to talk about rehabilitating a person who committed an involuntary act. If a person constitutes a continuing threat to others because of her involuntary movements, there are civil commitment procedures or other non-criminal means of addressing that problem. *See id.* ("Restraint or rehabilitation might be deemed appropriate ... where individuals are likely to constitute a continuing threat to others because of their involuntary movements, but it is probably best to deal with this problem outside the criminal law."). Rather than serving the purposes of criminal law, punishing individuals for involuntary actions would undermine the legitimacy of the criminal law. *See* Model Penal Code commentary to § 2.01(1) at 215 (emphasizing that "the sense of personal security would be undermined in a society where such movement or inactivity could lead to formal social condemnation of the sort that a conviction necessarily entails").

For similar reasons, the requirement of a voluntary act applies to crimes of omission. When a person fails to do some positive action required by the law, her failure to act is involuntary if she is mentally or physically incapable of performing the action. *See* Wayne R. LaFave, *Substantive Criminal Law* § 6.2(c), pg. 445 (2d ed. 2008) ("Just as one cannot be criminally liable on account of a bodily movement which is involuntary, so one cannot be criminally liable for failing to do an act which he is physically incapable of performing."); Paul H. Robinson, *Criminal Law Defenses* § 87(a), pg. 449 (1984) ("[I]t is a defense to omission liability that the actor is not capable of performing the required act."); Model Penal Code §

2.01(1) ("A person is not guilty of an offense unless is liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."). As D.A. Stroud famously said, "there can be no … breach of a law, where there is no possibility of performance." D. Aikenhead Stroud, *Mens Rea or Imputability Under the Law of England* 190 (1914). A person must be able to comply with the law before criminal liability will attach.

As early as the nineteenth century, courts held that, before a person can be held criminally responsible for neglecting to provide a child with food and proper support, it must first be demonstrated that the person had the means to do so. *See, e.g., State v. Noakes*, 40 A. 249, 254 (Vt. 1897) ("To render criminal the neglect of parents and others having charge of children or other dependents, there must be capacity, means, and ability to provide support and care, or to prevent the threatened harm, as well as the legal duty to provide and act. If there is not capacity, means, and ability to perform the legal duty, the omission to perform it is not criminal.").[2] Such a requirement is necessary both to serve the goals of the criminal law and to prevent the unfair punishment of individuals who are actually incapable of complying with the legal duty to provide support. To avoid criminalizing an involuntary act, every other state in the country now recognizes a defense to criminal nonsupport if the defendant was unable to pay. *See* Br. of Defendant-Appellant at 11-16 n.4.

---

[2] *See also Dempsey v. State*, 157 SW 734, 735 (Ark. 1913) (holding that, before a defendant can be convicted for neglecting to provide support for his wife and child, it must be shown that he had the ability to pay); *R. v. Chandler* (1855) 6 Cox C.C. 519, 169 Eng. Rep. 801 (refusing to permit conviction for neglecting to provide an infant with sufficient food because the mother did not have sufficient means to do so); *R. v. Hogan* (1851) 5 Cox C.C. 255, 169 Eng. Rep. 504 (quashing a conviction for unlawfully deserting a four-day-old child without providing any means of support because it was not shown that the accused had adequate means to provide for the support); *R. v. Vann*, (1851) 5 Cox. C.C. 379, 169 Eng. Rep. 523 (rejecting a charge of parental neglect for failure to bury the body of a child and noting that, if a parent has the means of giving his deceased child a Christian burial, he is bound to do so, but he is not to be indicted for a misdemeanor if he has not the means).

The application of the voluntary act requirement to crimes of omission is not just entrenched in this nation's history; it is also a fundamental part of this Court's jurisprudence. More than a century ago, this Court endorsed the principle that an omission must be voluntary before it may be used to establish criminal responsibility. *See City of Port Huron v. Jenkinson*, 77 Mich. 414, 419, 43 N.W. 923, 924 (1889). As this Court put it, "[n]o legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible for him to perform, and then make his non-performance of such duty a crime, for which he may be punished by both fine and imprisonment." *Id.* The defendant in *Jenkinson* had failed to comply with a statutory duty imposed on him by city ordinance to build or repair a sidewalk along the street in front of the premises he occupied. The omission was involuntary, this Court noted, because the defendant was too poor to construct said sidewalk. *Id.* at 420, 43 N.W. at 924. After noting that the defendant was incapable of performing the act, this Court declared the statute that required him to build a sidewalk unconstitutional and void. *Id.* The law was "obnoxious to our constitution and laws" and "a disgrace to the legislation of the state," because it imposed criminal sanctions for involuntary conduct in violation of longstanding, bedrock principles of criminal liability and in contravention of principles of fundamental fairness. *Id.*

The idea of criminally punishing someone for being indigent is so repugnant to our notions of fundamental fairness that the United States Supreme Court has declared it unconstitutional to criminally penalize someone for failing to pay a fine without first considering his ability to pay it. *See Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (holding that it is "contrary to the fundamental fairness required by the Fourteenth Amendment" to "deprive [a person] of his … freedom simply because, through no fault of his own, he cannot pay"). In

short, state, federal, and foreign English-speaking courts agree that it is a central tenet of the criminal law and a matter of fundamental fairness under constitutional law that no person shall be criminally liable for an involuntary act or omission.

II. THE MICHIGAN COURT OF APPEALS IMPROPERLY CONCLUDED THAT THE VOLUNTARY ACT REQUIREMENT DOES NOT APPLY TO THE STRICT LIABILITY CRIME OF FAILURE TO PAY CHILD SUPPORT.

A. The Involuntary Act Requirement Applies to Strict Liability Crimes.

Although the general rule is that the commission of a crime requires a culpable mental state in addition to an overt act, strict liability offenses depend on no mental state. They only consist of forbidden acts or omissions. Many traffic infractions are strict liability crimes, and, after the Michigan Court of Appeals's decision in *People v. Adams*, 262 Mich. App. 89, 683 N.W.2d 729 (2004), the failure to pay child support in violation of MCL 750.165 is also a strict liability crime. However, even strict liability offenses must be predicated on voluntary acts.

The voluntary act doctrine affects the question of criminal liability at an earlier level than issues surrounding *mens rea*, because an involuntary act cannot satisfy the *actus reus* requirement. *See* Ingrid Patient, *Some Remarks About the Element of Voluntariness in Offences of Absolute Liability*, 1968 Crim. L. Rev. 23, 27-28. Thus, even where *mens rea* is not required, a voluntary act is still a prerequisite for criminal liability. *See* H.L.A. Hart, *Acts of Will and Responsibility*, in Punishment and Responsibility 90 (1968) (noting that the voluntary act requirement applies to strict liability crimes). Consider the following example: Suppose a person is driving down the street and fails to see that there is a person in the crosswalk ahead. Suppose further that the reason why the driver failed to see the person in the crosswalk is because the street lights were malfunctioning and it was dark on the street. If the driver fails to give way to the person in the crosswalk, and the failure to give way is a strict liability offense in

the jurisdiction, he will be guilty regardless of the fact that it was an accident and he did not intend to violate the law. If, however, a swarm of bees attacks him and causes him to swerve into the crosswalk, he will not be guilty of the strict liability offense, because he has not committed the voluntary act of failing to give way to the person in the crosswalk. For this reason, treatises and courts routinely recognize that, "[t]o prove a violation of a strict liability statute, the state need only prove that the accused engaged in a voluntary act, or an omission to perform an act or duty which the accused was capable of performing." 21 Am. Jur. 2d *Criminal Law* § 132 (2009); *People v. Lopez*, 140 P.3d 106, 114 (Colo. App. 2005) ("The minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. If that conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, the offense is one of 'strict liability.'"); *State v. Gadreault*, 758 A.2d 781, 785 (Vt. 2000) ("While a strict liability crime does not require a culpable mental state, it does require a voluntary criminal act."); *see also Kilbride v. Lake* [1962] N.Z.L.R. 590 (noting that a person charged "must be shown to be responsible for the physical ingredient of the crime or offence. This elementary principle obviously involves the proof of something which goes behind any subsequent and additional enquiry that might become necessary as to whether *mens rea* must be proved as well. Until that initial proof exists arguments concerning *mens rea* are premature.").

The same logic applies to strict liability crimes of omission. The city ordinance that required Mr. Jenkinson to build a sidewalk in front of his property created a strict liability offense, but this Court did not say in *City of Port Huron v. Jenkinson* that the strict liability nature of the offense prevented Mr. Jenkinson from asserting that he was incapable of

performing the criminal act. Instead, this Court properly recognized that the question of whether a person is capable of performing an act is a necessary part of determining whether the *actus reus* of the crime has been satisfied, and it is independent of the question of *mens rea.*

B. The Michigan Court of Appeals Erroneously Held that Inability to Pay is Irrelevant to the Strict Liability Crime of Failure to Pay Child Support.

The Michigan Court of Appeals erroneously conflated the concepts of *actus reus* and *mens rea* as applied to the felony nonsupport statute in *People v. Adams*, 262 Mich. App. 89, 683 N.W.2d 729 (2004). In the course of concluding that MCL 750.165 created a strict liability crime, the court held that the strict liability nature of the crime necessarily meant that inability to pay could not be a defense. *Id.* at 100, 683 N.W. 2d at 735. The court of appeals then repeated its mistake in the instant case when it held that "evidence of the inability to pay was not relevant to any fact at issue." *People v. Likine*, 2010 WL 1568450, at *5, 288 Mich. App. 648.[3] As demonstrated above, the voluntary act requirement is "the fundamental requirement of all criminal liability, whether the offence is one of absolute prohibition or one involving proof of a guilty mind." J. Edwards, *Automatism and Criminal Responsibility*, 21 Mod. L. Rev. 375, 379 (1958). The Court of Appeals's suggestion to the contrary is not only at odds with the longstanding criminal law requirement of a voluntary act, it is also at odds with the holding of every other jurisdiction in this country to address the question. Every other state recognizes that inability to pay is a defense to the crime of failure to pay child support. *See* Br. of Defendant-Appellant at 11-16 n.4; *see also* United States Manual for Courts-Martial, R.C.M. § 916(j)(2)(i)

[3] The State makes a similar mistake in its brief when it characterizes Ms. Likine's attempt to present evidence of her inability to pay as an attempt to present a diminished capacity defense. *See* Br. of Plaintiff-Appellee at 24. The partial defense of diminished capacity is a defense to the *mens rea* of a criminal charge. Even if Michigan did recognize such a defense, it would be inapplicable to a strict liability crime for which *mens rea* is not required. Ms. Likine, however, was arguing that her inability to pay demonstrated that she did not perform a voluntary omission in this case. It is directly relevant to the question of *actus reus* – not the question of *mens rea.*

(2008) ("It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty."). And more importantly, this Court has recognized that financial inability to comply with a legal duty imposed by statute is a valid defense to a criminal charge. *City of Port Huron v. Jenkinson*, 77 Mich. 414, 419, 43 N.W. 923, 924 (1889).

The lower Michigan Courts erred in holding that Ms. Likine was not entitled to assert inability to pay the child support payments as a defense. Taken to their logical conclusion, the lower court decisions would impermissibly expand criminal liability and lead to absurd results. For example, a woman who lapsed into a coma the day after she was ordered to make child support payments would be criminally liable for failing to pay for the entire duration of her coma even though it was physically impossible for her to make payments during that time. Criminally punishing a person who is unable to make payments does not serve the goals of the criminal law and does not serve the interests of the child for whom the payments are supposed to be made. It merely undermines the legitimacy of the criminal law. Selesa Likine was entitled to present evidence of her inability to pay and have the jury determine whether she was capable of fulfilling her statutory duty to pay child support or whether her omission was involuntary and thus noncriminal.

Permitting an involuntary act defense to the charge of felony failure to pay child support would not open the floodgates to defense claims of inability to pay. In order for the involuntary act doctrine to apply, the inability to pay must be a true mental or physical inability to pay and not the result of conscious choices made by the defendant. A person is not permitted to take actions that she knows could result in criminal conduct down the line. For this reason, a defendant who quits his job on a whim or gambles away his money would not be incapable of

paying child support under the law. Rather, his decision to quit or gamble would be a voluntary act upon which criminal liability could be premised. "Although a voluntary act is an absolute requirement for criminal liability, it does not follow that every act up to the moment that the harm is caused must be voluntary. If a person knows that he is really tired and drives and falls asleep and hits someone else while asleep, the decision to drive while sleepy was a voluntary act even though the striking of the other car was involuntary." Wayne R. LaFave, *Substantive Criminal Law* § 6.1(c), pg. 429 (2d ed. 2008). Thus, if the defendant is at fault in creating the circumstances that give rise to his inability to pay, he should not be entitled to the involuntary act defense.

III. THE MICHIGAN TRIAL COURT'S DECISION TO PREVENT MS. LIKINE FROM PRESENTING AN INVOLUNTARY ACT DEFENSE VIOLATED HER CONSTITUTIONAL RIGHTS UNDER BOTH THE MICHIGAN CONSTITUTION AND THE UNITED STATES CONSTITUTION.

A. Preventing Ms. Likine from Presenting an Involuntary Act Defense Violates Her Rights under the Michigan State Constitution.

More than a century ago, this Court clearly held that a statute that imposes a duty on someone to perform an act which it is impossible for him to perform is "obnoxious to our constitution and laws" and must be struck down. *See City of Port Huron v. Jenkinson*, 77 Mich. 414, 420, 43 N.W. 923, 924 (1889). Affirming the lower courts' decisions in this case would require this Court to overrule that part of the *Jenkinson* holding. Under this Court's principles of *stare decisis*, there is a presumption that upholding precedent is the preferred course of action unless a compelling justification exists to overturn it. *See Regents of the University of Michigan v. Titan Ins. Co*, 487 Mich. 289, 303, 791 N.W.2d 897, 904 (2010). There is no such compelling justification here. In fact, all of the factors that this Court considers when deciding whether to overrule its precedents support retention of *Jenkinson*.

Historically, the Court considers seven factors when deciding whether to overrule a precedent: (1) whether the precedent has proved to be intolerable because it defies practical workability, (2) whether reliance on it is such that overruling it would cause a special hardship and inequity, (3) whether related principles of law have so far developed since the precedent was pronounced that no more than a remnant of it has survived, (4) whether facts and circumstances have so changed, or come to be seen so differently, as to have robbed the precedent of significant application or justification, (5) whether other jurisdictions have decided similar issues in a different manner, (6) whether upholding the precedent is likely to result in serious detriment prejudicial to public interests, and (7) whether the prior decision was an abrupt and largely unexplained departure from then existing precedent. *Id.* at 303-304, 791 N.W.2d at 904-05. Each one of these factors supports retention of the *Jenkinson* holding.

This Court's holding that a person cannot be punished for committing an involuntary omission is far from unworkable. It has, in fact, been universally endorsed nationwide. *See* Wayne R. LaFave, *Substantive Criminal Law* § 6.1(c), pg. 425 n.24 (2d ed. 2008) (collecting cases and statutes). This century-old precedent has been relied on by treatise writers and members of this Court in subsequent cases. *See, e.g.*, *People v. Dowdy*, 484 Mich. 855, 855-56, 769 N.W.2d 648, 649 (2009) (Kelly, C.J., concurring); *id.* at 862 n.22, 769 N.W.2d at 654 n.22 (Hathaway, J., dissenting); Wayne R. LaFave, *Substantive Criminal Law* § 6.2(c), pg. 445 n.50 (2d ed. 2008). If anything would result in a serious detriment prejudicial to the public interest and would constitute an unexplained departure from existing precedent, it would be overruling *Jenkinson*. Removing the involuntary act requirement from the criminal law would result in inequitable results that undermine the purposes of the criminal law and decrease the legitimacy of Michigan's system of criminal justice in the eyes of the public. Nothing is more repugnant to

principles of fairness than criminally punishing someone for failing to do something that she is physically incapable of doing.

B. Preventing Ms. Likine from Presenting an Involuntary Act Defense Violates Her Rights under the United States Constitution.

Preventing Ms. Likine from asserting an involuntary act defense to MCL 750.165 violates her rights under the United States Constitution in addition to violating her rights under the Michigan Constitution. As applied to individuals who are mentally or physically incapable of making child support payments, MCL 750.165 is unconstitutional because it creates a status crime rather than punishing a person for a criminal act. The Supreme Court has held that it violates the Eighth Amendment prohibition against cruel and unusual punishments (as applied to the States by the Fourteenth Amendment) to criminally punish someone for her status rather than for her actions. *See Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that one cannot be punished for being a drug addict, because it is "an illness which may be contracted innocently or involuntarily"); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (striking down a vagrancy statute because it furnished the executive with "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure' [and] result[ed] in a regime in which the poor and the unpopular [we]re permitted to 'stand on a public sidewalk . . . only at the whim of any police officer'" in violation of their due process and equal protection rights (internal citation omitted)).

A status crime differs from a crime predicated on criminal acts in two ways: "(1) like all events, acts tend to be of short duration, while states can be quite long-lasting or even permanent; (2) human acts essentially involve the choice (or willing) of the actor in a way that states of that actor do not." Michael S. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* 19 (1993); *see also Robinson v. California*, 370 U.S. 660, 662-63 (1962) ("To

be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that (it) is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms."). By interpreting MCL 750.165 as preventing a defense predicated on the physical inability to pay, the lower Michigan courts effectively created a status crime. Just as it was unconstitutional to punish Mr. Robinson simply for being a drug addict, it would be unconstitutional to punish Ms. Likine if the reason she could not make child support payments was because she was too disabled to work. The Michigan Court of Appeals's interpretation of MCL 750.165 is unconstitutional as applied to poor or disabled individuals who are mentally or physically unable to make child support payments, because it punishes them on account of their status.

IV. THE MICHIGAN COURT OF APPEALS ERRED WHEN IT HELD THAT RES JUDICATA PRINCIPLES PRECLUDED MS. LIKINE FROM PRESENTING AN INVOLUNTARY ACT DEFENSE.

Ms. Likine was entitled to raise an involuntary act defense to the charge of felony failure to pay child support, and the Family Court's order establishing the amount of her support payments cannot bar her from asserting this defense. The Michigan Court of Appeals's determination that res judicata principles preclude Ms. Likine from mounting an inability to pay defense in this case is incorrect for two reasons. *People v. Likine*, 2010 WL 1568450, at *3-4, 288 Mich. App. 648. First, it would violate a criminal defendant's state and federal constitutional rights if the State were permitted to use a civil, Family Court judgment about ability to pay to prevent the defendant from contesting an essential element of a criminal charge. And second, assuming arguendo that that State could use res judicata principles to import Family

Court determinations into a pending criminal case, such principles would not apply under the facts of this case.

As an initial matter, this Court has already held that "the doctrines of res judicata and collateral estoppel cannot be invoked to preclude a defendant in a criminal case from contesting an essential element of a charge," because to do so would violate the defendant's state and federal constitutional rights to trial by jury and to be presumed innocent. *People v. Goss*, 446 Mich. 586, 600, 521 N.W. 2d 312, 316-17 (1994). As this Court stated in *Goss:*

> The right to a jury trial applies in every and all criminal prosecutions. We hold that such a right to a jury trial necessitates that every jury empaneled for a prosecution considers evidence of guilt afresh and without the judicial direction attending collateral estoppel .... [A]pplying collateral estoppel against the defendant in a criminal case interferes with the power of the jury to determine every element of the crime, impinging upon the accused's right to a jury trial. Such an application is constitutionally invalid.

Goss, 446 Mich. At 602, 521 N.W.2d at 318 (quoting *United States v. Pelullo*, 14 F.3d 881, 896 (3d Cir. 1994)). The State attempts to get around this Court's holding in *Goss* by arguing that a defendant's ability or inability to pay is not an essential element of the criminal charge of felony failure to pay child support. *See* Br. of Defendant-Appellant at 26 n.7. What the State fails to recognize, however, is that the *actus reus* requirement is an essential element of *every* criminal charge. The State has the burden in a criminal case to prove beyond a reasonable doubt that the defendant committed a crime, which requires the State to prove that the defendant committed the relevant *actus reus*. Therefore, it would unconstitutionally infringe on Ms. Likine's constitutional rights to trial by jury and to the presumption of innocence in violation of this Court's decision in *Goss* were she precluded from contesting that she did not commit the relevant *actus reus* of failing to pay child support because her actions were involuntary. The purposes of res judicata principles are "to relieve parties of the cost and vexation of multiple

lawsuits, conserve judicial resources, and encourage reliance on adjudication." *Richards v. Tibaldi*, 272 Mich. App. 522, 530, 726 N.W.2d 770, 776 (2006). But as this Court noted in *Goss*, "in criminal cases, finality and conservation of private, public, and judicial resources are lesser values than in civil litigation." *Goss*, 446 Mich. At 609, 521 N.W.2d at 321 (quoting *Ashe v. Swenson*, 397 U.S. 436, 464-65 (1970)).

Moreover, even assuming arguendo that res judicata principles could be used to inject Family Court determinations into a criminal nonsupport case, they are not applicable in this case. To be applicable, res judicata requires that "(1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies." *Richards v. Tibaldi*, 272 Mich. App. 522, 531, 726 N.W.2d 770, 776 (2006) (citing *Baraga Co. v. State Tax Comm.*, 466 Mich. 264, 269, 645 N.W.2d 13 (2002)). Here, the third and requirement simply does not apply.

The Family Court issued an order on August 23, 2006 indicating what it thought Ms. Likine should be able to pay going forward. The question presented by Ms. Likine's defense in this criminal case is entirely different. The question in her criminal case is whether she was physically capable of making the payments *when she missed those payments,* not at the time when the Family Court issued its order. Ms. Likine's ability to make payments when she missed them was not at issue (and could not have been presented) at the earlier Family Court hearing. As a result, by this Court's own principles, the Family Court judgment cannot be used to bar Ms. Likine from asserting an involuntary act defense at her criminal trial.

CONCLUSION

Therefore, Amicus Curiae Michigan Criminal Law Professors respectfully requests that this Court reverse the judgment of the Court of Appeals and remand for a new trial at which Defendant-Appellant Selesa Likine would be entitled to present a defense of inability to pay.

Respectfully Submitted,

Eve Brensike Primus

Eve Brensike Primus (P70420)
Attorney for Amicus Curiae

Dated: April 18, 2011

STATE OF MICHIGAN

IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
JUDGES: E. THOMAS FITZGERALD, MARK J. CAVANAUGH AND ALTON T. DAVIS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v Supreme Court No. 141154

SELESA A. LIKINE,

Defendant-Appellant.

_____/

APPENDIX TO BRIEF FOR MICHIGAN CRIMINAL LAW PROFESSORS AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

By: Eve Brensike Primus (P70420)
Assistant Professor of Law
The University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109
(734) 615-6889
Attorney for Amicus Curiae

APPENDIX

Amici Curiae Michigan Criminal Law Professors

This Appendix provides *amici*'s titles and institutional affiliations for identification purposes only, and not to imply any endorsement of the views expressed herein by *amici*'s institutions.

Jack Apol
Professor of Law Emeritus
Michigan State University College of Law

Ronald Bretz
Professor of Law
Thomas M. Cooley Law School

J. Richard Broughton
Assistant Professor of Law
University of Detroit Mercy School of Law

Patrick Corbett
Professor of Law
Thomas M. Cooley Law School

Alan Gershel
Associate Professor of Law
Thomas M. Cooley Law School

Samuel R. Gross
Thomas and Mabel Long Professor of Law
University of Michigan Law School

Catherine M. Grosso
Assistant Professor of Law
Michigan State University College of Law

Lisa K. Halushka
Professor of Law
Thomas M. Cooley Law School

Yale Kamisar
Clarence Darrow Distinguished University Professor of Law Emeritus
University of Michigan Law School

Tonya Krause-Phelan
Associate Professor of Law
Thomas M. Cooley Law School

Valerie Newman
Adjunct Clinical Assistant Professor of Law
University of Michigan Law School

John Nussbaumer
Associate Dean and Professor of Law
Thomas M. Cooley Law School

Barbara O'Brien
Associate Professor of Law
Michigan State University College of Law

J.J. Prescott
Assistant Professor of Law
University of Michigan Law School

Eve Brensike Primus
Assistant Professor of Law
University of Michigan Law School

Sonja B. Starr
Assistant Professor of Law
University of Michigan Law School

Kathy Swedlow
Professor of Law
Thomas M. Cooley Law School

Mark D. West
Nippon Life Professor of Law and Associate Dean for Academic Affairs
University of Michigan Law School